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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950.

No. 461

In the Matter of
FEDERAL FACILITIES REALTY TRUST, a Common Law Trust, and NATIONAL REALTY TRUST, a Common Law Trust,

Debtors,

STACY C. MOSSER, Successor Trustee of National Realty Trust and Federal Facilities Realty Trust, and JOHN W. GUILD, Indenture Trustee, etc.,

Petitioners,

vs.

PAUL E. DARROW, Former Trustee of National Realty Trust and Federal Facilities Realty Trust,

Respondent.

REPLY BRIEF OF PAUL E. DARROW, FORMER TRUSTEE IN BANKRUPTCY, TO BRIEFS OF PETITIONERS AND SECURITIES AND EXCHANGE COMMISSION.

STATEMENT OF THE CASE.

I.

All of the Briefs filed by the Petitioners and the Securities and Exchange Commission in this Court contain Statements of Fact. However, all of those statements, in our opinion, fail to give this Court a true and complete picture

of Respondent's administration of the Estates of National and Federal. The major fault of those statements is that they all water-down and minimize certain important and controlling facts which should be brought to the attention of this Court. We, therefore, propose to make a brief additional statement.

BENEFITS TO THE ESTATES RESULTING FROM THE EMPLOYMENT OF KULP AND JOHNSON.

As a direct result of the activities of Respondent Darrow's part-time employees, Myrtle Johnson and Jacob Kulp, in aiding him in the management of the two Trusts, both Trusts and their various subsidiaries have substantially benefited. The Court of Appeals was obviously impressed with that important fact and devoted several pages of its opinion to a discussion of those benefits. That Court, after stating that it was Darrow's policy as Trustee to purchase the outstanding securities of the subsidiary corporations, made findings (Rec. pp. 680-682) which may be summarized and paraphrased as follows:

Reduction of Indebtedness of Subsidiaries.

Due to these purchases made by Darrow largely through and with the aid of Johnson and Kulp, the obligations of the subsidiaries of National and Federal were reduced during the eight years of Darrow's trusteeship from $7,611,700 par value to $5,197,100 par value. As a result, the total bonded indebtedness of the subsidiaries was reduced under Darrow's administration in the sum of ..... $ 2,414,600.00

Actual Profits Made by the Two Trusts.

The Court of Appeals next found that as a result of Darrow's purchase of bonds of

the subsidiaries of Federal, for the account of Federal, that Trust has realized an actual cash profit of ..... $ 79,729.45

The Court arrived at this figure on the following basis: The total cost of bonds purchased by Darrow for the account of Federal was $31,864.55. At the time of the hearings before the Master, the market value of these bonds was in excess of $87,-100. From the date of their purchase by Darrow to the hearings before the Master, Federal had received on these bonds $24,494 in interest. The amount of the actual profit realized by Federal on these purchases by Darrow is obvious from these figures.

The Court next found with respect to National, that as a result of Darrow's purchases of bonds of subsidiaries of that Trust and for its account, National has realized an actual cash profit of ..... $ 51,122.56

This figure is arrived at by the same method of computation as in the case of Federal. The total cost of bonds purchased by Darrow for National was $47,469.25. At the time of the hearings before the Master, the market value of these bonds was $77,179. From the date of their purchase by Darrow to the date of the hearings before the Master, National had received on these bonds $21,412.81 in interest. The amount of the actual profit realized is again obvious from these figures.

The Court next found that Darrow had acquired from the First National Bank of Chicago for the sum of $12,000, Collateral Trust bonds issued by Federal which had a par value of $84,000. With respect to these the Court further found that "it seems to be reasonable" that these bonds on a reorganization will be "found to be worth par." The Court also found that in the meantime since the date of Darrow's ac-

quisition of such bonds, Federal has been relieved from the payment of or the obligation to pay interest on such $84,000 of par value of its bonds. Therefore (without regard to the saving of interest), it appears that on this transaction of Darrow's, Federal has realized another actual profit of . . . $ 72,000.00

This purchase of bonds from the First National Bank, it should be noted, was made at the suggestion and with the cooperation of Johnson and Kulp (R. 279).

The Court of Appeals next made findings with respect to the bonds of the various subsidiaries purchased by Darrow from Johnson in the so-called "Seligman transaction." The facts with respect to that transaction are extremely complicated as indicated by the Statements of Fact in the various Briefs; in the Master's Report and in the opinion of the Court of Appeals. However, the net result of the transaction as found by that Court, was that an actual cash profit had been realized by the estates, up to the date of the hearings before the Master in the amount of . . . . . $ 18,747.45

This profit is computed upon the following facts as found by the Court: That Darrow had paid $12,447.55 for these bonds and that at the time of the hearings before the Master they had a market value of $31,195. The amount of the profit is obvious.

The total actual profits realized by the two Trusts by Darrow's purchase of bonds of the various subsidiaries for the accounts of the two Trusts as shown above is . . . . . $ 221,599.00

These findings of the Court of Appeals cannot be disputed, since they are taken directly from the Report of the Master. The above figures clearly demonstrate the great value of the services of Johnson and Kulp to Darrow in the administration of the two Trusts.

THE PETITIONERS AND THE SEC BOTH MINIMIZE OTHER IMPORTANT FACTS CONCERNING THE EMPLOYMENT OF JOHNSON AND KULP.

There are two other main aspects of the employment of Johnson and Kulp which are ignored or minimized in the Statements of the Case in the Briefs of the Petitioners and the SEC which we feel are necessary to a proper understanding of the case by this Court. These are as follows:

Johnson and Kulp of Great Value to Darrow in Other Respects.

This Court, we believe, will take judicial notice of the many complicated business and financial situations involved in the administration of National and Federal and their 27 subsidiary corporations which were all in financial difficulties at the time of Darrow's appointment as Trustee. Prior to his appointment, the two Trusts and their Subsidiaries were being administered by Andresen, who had succeeded Johnson and Kulp as Common Law Trustee of the two Trusts. He also had been acting as Trustee under a trust agreement set up by Kulp for the benefit of the security holders of Federal and National and their subsidiaries (Rec. pp. 154, 155, 182, 204, 517, 532, 538, and 540). During Andresen's administration of the two Trusts, including the operation of their 27 subsidiaries, he had employed Johnson and Kulp on a part-time basis to assist him as Trustee. While employed by Andresen, they continued to operate Colonial Securities Company as a private business as they had done in the past (Rec. pp. 272, 273). When Darrow was appointed trustee for Federal and National, Andresen recommended to him that he continue

Johnson and Kulp in his employ as Trustee (Rec. pp. 318-319) because of their familiarity with the entire organization and their knowledge of the many complications which had arisen in connection with the affairs of the various subsidiaries. The Court of Appeals made the following finding with respect to that situation:

> "After the appointment and qualification of Darrow, the former trustee, George Andresen, recommended to him that he employ Jacob Kulp and Myrtle Johnson to assist him. It was pointed out that they were well qualified to assist because of their intimate knowledge of the workings of the Trusts and their subsidiaries."

Johnson and Kulp Part-Time Employees Only.

Johnson and Kulp made it a condition of their employment by Darrow that they would be expected to devote only part of their time to the affairs of the Trusts, and that they would have the right to operate Colonial Securities Company and continue in the business of purchasing and selling securities for the account of Colonial and for their own account as they had done while employed by Andresen (Rec. pp. 188, 189, 273, 274, 318, 319, 339, 340, 343, and 344). The Court of Appeals made the following finding on that point:

> "Miss Johnson and Kulp made it clear that they would remain as part-time employees only on condition that they be allowed to continue to operate in the securities business through Colonial Securities Company. Darrow employed them on a part-time basis and they continued to operate Colonial in the same way that had been practiced during their employment by the Andresen Trust."

DARROW'S MOTIVES AS TRUSTEE.

The entire record shows that during all the period of Darrow's administration of the two Trusts he was at all times concerned with what would benefit the Estates he represented and make their reorganization possible. He was actuated by the best of motives and the policy which he adopted was what he considered to be for the best interests of the Estates (R. p. 198). He had no selfish motive and he made no personal profit as a result of his purchases of securities (Rec. pp. 515-554). The results which he accomplished speak for themselves.

DARROW'S OWN JUDGMENT ON PURCHASES DECISIVE.

Another important fact situation which is utterly ignored and omitted by the Statements of the opposition here, but which should be understood by this Court, is this: It was Darrow's judgment and discretion as Trustee that made the decision as to the purchase of each and every item of the several million dollars par value of securities that were purchased by Darrow as Trustee under his management of these two Trusts and at very satisfactory depreciated prices (Rec. pp. 334, 513). The Record shows two things with respect to every individual purchase of securities for these two Estates: *First* that Darrow exercised his personal prerogative as Trustee to say yes or no as to whether the purchase would be made; and *second* that in each individual instance the purchase was made at the going market price of the securities. Thus it appears affirmatively in this case that Darrow stood as the final arbiter in deciding what was for the best interests of these two

Estates in the case of every purchase made through his two employees.

Darrow was an experienced business man. Among other business activities he had been employed in a Chicago bank and had also spent five years in the employ of one of the leading stockbrokers of Chicago, just prior to his appointment as Trustee of these two Estates (R. 202).

NO PRIVATE RIGHTS OR INTERESTS HERE ALLEGED—ABSTRACT AND ACADEMIC ISSUES ONLY.

This proceeding purports to have been filed on behalf of Mosser as Trustee in Bankruptcy of these two Estates, plus the intervention of Guild, who appears in the Record only as an indenture-trustee in one of these Estates (Federal). The proceeding, therefore, involves solely the private rights and interests—if any—of the creditors of these two Bankrupt Estates. Under the rules of Pleading it is necessary that a plaintiff's Statement of the Case shall charge and set forth his substantial rights and interests in the controversy. A similar rule should apply to a Statement of the Case in a Brief in this Court. A reading of the Statements which have been made by the Petitioners and the SEC in their Briefs in this Court shows that they contain no assertions or claims of financial interest on the part of any person involved in this case. In Respondent Darrow's Answer to the Petition for Certiorari and Brief filed in this case (pp. 21, 23) it was charged that no property rights whatever are here involved, and that the proceeding is "a purely abstract and hypothetical effort to establish new law." That charge has nowhere been challenged by any of the succeeding Statements or Briefs of either the Petitioners or the SEC.

Accordingly it must be taken for granted in this case that there is an utter lack of any financial interest on the part of anyone.

Indeed the Opinion of the Court of Appeals strongly suggests that lack of financial interest (Rec. p. 682) where it specifically says that the "expectation seems to be reasonable" that all of the bonds of Federal will be paid at par and therefore, no creditor at least of that Estate will lose a cent, because of Darrow's able management of its affairs. It is the bonds of Federal which Guild, one of the Petitioners, represents as indenture trustee.

UNFAIR IMPLICATIONS IN THE STATEMENTS OF FACT BY PETITIONERS AND SEC.

There are several statements made by Petitioners and the SEC which are unfair and which we feel carry with them improper implications which tend to give this Court wrong impressions on several phases of the case. We call attention to some of them.

The Andrews Report and Darrow's Resignation.

Petitioners state (Br. p. 4) that Darrow resigned as Trustee of National and Federal "following a thorough investigation and report of his administration as Trustee by Frederick B. Andrews." This statement creates the impression that Darrow resigned as Trustee *because* of such report, and it further implies that the report in some way disclosed facts reflecting on his integrity or indicating that he had not administered the Trusts successfully or in their best interests. There is nothing in the Andrews report which caused Darrow to resign as Trustee, nor is there anything in that report reflecting on his loyalty to the Trusts or his accounts.

Since the question of the reason for Darrow's resignation has been raised by Petitioners by what we consider to be their unfair reference to the Andrews report, we feel it necessary to state that the record discloses that Darrow resigned as a result of an altercation which he had with representatives of the Securities & Exchange Commission in Chicago in 1943 with reference to his employment of Johnson and Kulp and their alleged profits in trading in securities of the Trusts. Darrow testified (Rec. p. 347) that he was told by the Regional Director of the SEC, who had summoned him to his office on that occasion, that unless he discharged Johnson and Kulp the Commission would take steps to have him removed as Trustee. The Regional Director denied that he had made that statement. In any event, it appears conclusively from the Record that Darrow's resignation came about because of that altercation over the question of Johnson's and Kulp's employment and their trading in the securities of the Trusts.

"Interception" of Bonds by Johnson and Kulp.

Petitioners (Br. p. 6) state that while Johnson and Kulp were employed by Darrow they individually and in the name of Colonial "intercepted" and purchased bonds brought in to the Trustee's office by bondholders seeking to sell them and they cite in support of that pages 168, 513 and 579 of the Record. The use of the word "intercepted" is improper. It is not borne out by the Record. There is nothing in the testimony at the pages of the Record cited by Petitioners to justify the use of that word. It appears to us that Petitioners, by the use of the word, have sought to create the impression that Johnson and Kulp surreptitiously and without Darrow's knowledge pur-

chased bonds by keeping the sellers of those bonds away from him. This is not a fact and there is nothing in the Record to so indicate. We repeat, the unfair implication from the unjustified use of the word "intercepted" by Petitioners is highly improper.

SUMMARY OF RESPONDENT'S ARGUMENT.

1. The employment of Kulp and Johnson was essential to the best administration of these two Bankrupt Estates. As the leading managers of these two Trusts before Bankruptcy they were thoroughly familiar with the complicated business and financial affairs of both Federal and National, as well as of their 27 subsidiary Corporations.

2. Both of these part-time employees were found to be thoroughly "competent" by the Master, and their skilled services to Darrow during the 8 years of his administration as Trustee were an important factor in producing the large benefits and profits to both Trusts which Darrow achieved by purchasing the underlying securities of the subsidiary Corporations, as shown in the above Statement of the Case.

3. Under these admitted facts, and under the applicable law, Darrow as Trustee, was thoroughly justified in retaining Kulp and Johnson in his employ.

4. Since Darrow's own conduct as Trustee was in all respects entirely honest and upright as found by the Master, it was most unjust and inequitable for the District Court to attempt to "surcharge" him in the large sum of more than $43,000.00, when he personally had acted in complete good faith.

5. There is no jurisdiction here because of the lack of proper Parties as Petitioners. This Certiorari proceeding should be dismissed on that ground alone.

ARGUMENT.[1]

I.

UNDER THE COMMON LAW, WHICH HAS BEEN ADOPTED BY THIS COURT, A TRUSTEE CANNOT BE SURCHARGED FOR ALLEGED IMPROPER ACTS OF HIS AGENTS OR EMPLOYES, UNLESS THE TRUSTEE HAS BEEN GUILTY OF "SUPINE NEGLIGENCE OR WILLFUL DEFAULT".

The Common Law as the Rule of this Court.

This Court in a recent Bankruptcy case, decided in 1937,[2] held that the test of whether a Bankruptcy Trustee should be subjected to a surcharge was to be determined by Common Law principles and said:

> "By the common law every Trustee or Receiver of an estate has the duty of exercising reasonable care in the custody of the fiduciary estate" etc.

By the decision in that case this Court accordingly has adopted the Common Law principles laid down by early English courts concerning surcharging Trustees in Bankruptcy.

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[1] We respectfully request the Court to consider also the Argument contained in each of the two prior Briefs filed on behalf of Respondent Darrow in this Court before Certiorari was granted.

[2] United States ex rel. Willoughby v. Howard, 302 U. S. 445; 82 L. Ed. 352; 59 S. Ct. 275 (1937).

The Opinion of this Court in the *Willoughby* v. *Howard* case does not discuss the Comman Law on the point but contents itself with setting forth an extended Note citing numerous cases where that doctrine of the law has been applied.

A Leading Case in This Court on the Point.

In the *Willoughby* v. *Howard* case this Court was merely following a rule which it had established more than 100 years ago in the leading case of *Taylor* v. *Benham,* 5 How. 233, 12 L. Ed. 130, decided in 1846. In that case this Court refused to surcharge a Trustee for a substantial sum of money, which it was charged the Trust had lost because of the alleged "negligence" of the Trustee in failing to sell certain real estate. In so holding this Court said:

> "A Trustee is liable for misconduct, or breach of trust, or negligence, as well as for money actually received. And if in these ways he injures his *cestui que trust,* he is liable, whether he himself gains by his misbehavior or not. • • •
>
> *"When a Trustee is made liable for more than he has actually received it must be in the language of the Books 'in cases of very supine negligence or willful default.'* 4 Johnson's Ch. 527 and 634; *Bypus* v. *Smith,* 1 Ves. Jr. 189, 30 Full English Reprint 294 (1790); *Palmer* v. *Jones,* 1 Vern. 144; *Osgood* v. *Franklin,* 2 Johnson's Ch. 27; 3 Bro. Ch. R. 340; 1 Madd 290; *Coffrey* v. *Darby,* 6 Ves. 497." (Italics added.)

The *Taylor* v. *Benham* case was strongly urged in Respondent Darrow's Brief before the Court of Appeals and the language from the Opinion of this Court, which is set out above, was quoted in that Brief. The Court of Appeals in its Opinion adopts as the *law of this case* the Rule that—

> "A Receiver is liable to surcharge only when guilty of fraud or supine negligence equivalent to fraud."

The Court of Appeals particularly cites the *Taylor* v. *Benham* case and says that the doctrine above announced "comes directly from the Opinion of the Supreme Court" in that case.

The Gist of This Case—the Necessity of Proving "Supine Negligence."

Under the rule of this Court, concerning surcharging Trustees, as laid down in the *Taylor* v. *Benham* case (and also as announced in several other leading cases from other States and from England which we shall discuss hereafter) the opposition here must somehow convince this Court that the Respondent Darrow has been guilty of "supine negligence," with respect to his employment of Kulp and Johnson. Unless they are successful in that effort their attack upon him would inevitably fail regardless of any other issues or questions in this case.

That point seems to be specifically admitted by the Brief for Petitioners filed herein (after Certiorari granted) since it is there stated (p. 19), after discussing what Counsel choose to call the "repeated breaches of trust" of his employees: "He exhibited supine negligence" (in his relations with those employees.) While the Brief of S. E. C. filed herein (after Certiorari granted) does not specifically use the term "supine negligence" it does charge him (p. 12) with a "flagrant abuse of his fudiciary responsibilities". That language seems to impute the same guilt and convey the same meaning.

The Court of Appeals Absolves Darrow of "Supine Negligence."

In view of the effort of the opposition to convict Darrow of what they call "supine negligence" in this case, it is important to note that the Court of Appeals considered that point at some length and absolved Darrow of any guilt in that particular. That Court, we have seen, adopted the language of this Court in the *Taylor* v. *Ben-*

ham case; that a Trustee must be guilty of "very supine negligence or willful default" before the Court can surcharge the Trustee for alleged fraudulent or disloyal acts and doings of his employees. In view of the fact that the Court of Appeals, after a full review of the facts, reversed the surcharge against Darrow, it must be assumed that the Court of Appeals found and determined that Darrow could not be charged with that type of guilt and that type of negligence under all the facts and circumstances shown by the Record. We believe that determination is sound and correct and that it should be sustained by this Court.

Chancellor Kent's Views.

This Court in the above quotation from the case of *Taylor* v. *Benham* particularly cites and relies upon the New York case of *Osgood* v. *Franklin*, 2 Johnson's Ch. 27, decided by Chancellor Kent. That case involved an effort to surcharge a Trustee with losses where it was claimed that certain lands had been fraudulently sold to relatives of the Trustee, and at an inadequate price. The evidence showed that the Trustee's relatives were directly involved in the purchase, and further that the price was below the general market. Accordingly the guilt of the Trustee's relatives in that case was grave and serious, and very different from the charge made against Darrow in this case. Nevertheless, Chancellor Kent refused to surcharge the Trustee and laid down the applicable doctrine in such cases as follows:

> "*I think upon the whole that would be too rigorous a conclusion.* A Court of Equity according to *Palmer* v. *Jones* (1 Vern. 144, 23 Full English Reprint 376) never charges a Trustee with imaginary values nor with more than he has received, *unless the proof be very strong of supine negligence.* Lord Thurlow said in *Bypus* v. *Smith* (1 Ves. Jr., 189, 30 Full English Re-

print 294) *'it must amount to a case of willful default.'"* (Italics added.)

We respectfully submit that the doctrine of this Court above quoted from *Taylor* v. *Benham*—and likewise the language of Chancellor Kent in *Osgood* v. *Franklin* ante—announce what Justice Brandeis in the *Howard* case has called "the Common Law" concerning surcharging Trustees. Under that doctrine, we submit, Darrow cannot be surcharged by this Court.

Justice Field on Surcharging Trustees.

The late Justice Stephen J. Field was a member of this Court from 1863 to 1897. While he was a member of the Supreme Court of California he took part in the decision of the case of *Ellig* v. *Naglee*, 9 Cal. 684, decided in 1858. In that case (the Opinion is by Judge Burnett, "concurred in by Justice Field") the Court had before it the question of surcharging a Trustee who had been carrying on large and important business transactions comparable to those of Darrow in this case. In its Opinion the Court made an observation that is equally pertinent to Darrow's situation when it said, with respect to the Trustee:

> *"Their administration of the trust estate considered as a whole was beneficial to the property and greatly increased its productive value."* (Italics added.)

In laying down the principles applicable to surcharging Trustees the California Court said:

> "It is a general principle applicable to Trustees that *when they act in good faith and without any selfish motive* they are entitled to be treated by a Court of Equity with liberality and indulgence." (Italics added.)

Here is a fundamental rule with respect to the liberal and indulgent attitude courts of equity always take toward Trustees who are not personally guilty, which is clearly reflected in some of the other decisions we shall discuss in this Brief and particularly in the English cases. The California Court continues:

> "Trustees act for the benefit of others and not for themselves, and the fair exercise of their judgments should be a protection to them. Very supine negligence or willful default will render them liable; but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking any trust."[3] Citing *Taylor* v. *Benham*, 5 How. 283.

The above language about "supine negligence" and "willful default" used by the California Court in 1858 was taken verbatim from the language of this Court in the *Taylor* v. *Benham* case which had been decided 12 years earlier.

Darrow Comes Within The Rule Announced in the Above California Case.

The record clearly establishes that Darrow, during the eight years of his administration as Trustee, at all times acted with the best of motives, with no selfish interest and for what he considered in his judgment to be in the best interests of the two Trusts. He made no personal profit as a result of his purchases of securities for the Trusts and never had any thought of doing so. We submit when these facts, together with the great benefits accruing to the

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[3] Later in this Brief we shall discuss the drastic rule contended for by the opposition in this case and compare it to the above language of the California Court to the effect that such a drastic rule "would tend to discourage good and prudent men from undertaking any trust". At the same place we will point out that this idea that the Courts must be "liberal and indulgent" with Trustees in surcharge matters originated with the language of Lord Hardwicke in the case of ex parte Belchier, 27 Full English Reprint 144 discussed later in this Brief.

Trusts, are considered he should not be punished by a surcharge, or penalized in any other manner. He very definitely comes within the rule laid down by the California Court in the case above cited.

A Leading Pennsylvania Case.

We will conclude this Point I of our Argument by a discussion of a leading Pennsylvania case, *Seamans* v. *United Lumber Company*, 281 Pa. 404, 126 Atl. 776, decided by the Supreme Court of Pennsylvania in 1924. In that case large quantities of lumber had been sold by the Receivers through a brokerage concern, in which one of the Receivers was personally interested. It will be seen, therefore, that the element of personal guilt of the Trustee was present in that case—an important and controlling fact which is entirely lacking here as far as Darrow is concerned.

In that case the Receivers had filed an account, in which they took credit for the commissions paid certain lumber brokers, and the creditors of the Estate insisted that the Receivers be surcharged for such commissions. In denying that contention the Pennsylvania Court said:

> "While courts will scrutinize with great care the conduct of officers appointed by them, who are at the same time interested in another company with which the delinquent deals, the mere fact that a relationship exists does not ordinarily condemn their acts, *particularly those done in good faith.* To reach such conclusions there should be some evidence in addition to the connection, to stamp the transactions with unfairness. No great amount of evidence is necessary, but it should appear that the *cestuis que trustent* suffered some pecuniary loss, traceable to a conflict of interest. We have testimony as to the fairness of sales and reasonableness of the agent's charge; the commissions paid the brokers must be sustained." (Italics added.)

The above quotation from the Pennsylvania Court, we say, lays down the sound and modern doctrine concerning surcharging trustees for alleged wrongdoings of their employees and holds that the courts will never surcharge the trustee for the acts and doings of the trustee himself which have been performed "in good faith." As we shall see later on in this Brief, that is the modern law of England which has recently been announced by the so-called Trustee Act of 1925 enacted by Parliament and discussed later on in this Brief.

Summary as to the Above Point I.

In our Argument above under Point I, we have endeavored to analyze the leading case of *Taylor* v. *Benham*, 5 How. 233, decided by this Court in 1846; also the case of *Osgood* v. *Franklin*, 2 Johnson's Ch. 27, decided in New York by Chancellor Kent and cited in this Court in the *Taylor* v. *Benham* decision; also the case from California of *Ellis* v. *Naglee*, 9 Calif. 684, decided by that Court when Justice Stephen J. Field, later a member of this Court, was on the California Court; and finally the modern Pennsylvania case of *Seamans* v. *United Lumber Co.*, 281 Pa. 404, 126 Atl. 776. It would be comparatively easy to extend the Argument of this Point I further and at considerable length. But we think the foregoing cases indicate the general principles of the law in America where it is urged that trustees be surcharged for the alleged wrongful conduct of their employees. In any event, we leave this Point I with the discussion above given.

II.

THE MODERN FEDERAL COURT DECISIONS HAVE CONSISTENTLY FOLLOWED A LIBERAL POLICY SO FAR AS SURCHARGING TRUSTEES IN BANKRUPTCY IS CONCERNED. THEY HAVE INSISTED UPON APPLYING THE GENERAL DOCTRINE OF TAYLOR v. BENHAM ANTE AND HOLD THAT THE TRUSTEE CANNOT BE SURCHARGED FOR THE DISLOYALTY OR WRONGFUL ACTS OF HIS EMPLOYEES WHERE HE HAD NO "PERSONAL FAULT", AND WHERE HE COULD NOT BE CHARGED WITH "SUPINE NEGLIGENCE". WHEN THAT MODERN TEST IS APPLIED IN THIS CASE IT CLEARLY ABSOLVES DARROW FROM ANY SURCHARGE WHATEVER.

The Application of Well-Known Principles, The Nub of This Case.

On this Appeal, as so often happens when lawyers disagree, it is the *application* of well-known principles of law to the facts and circumstances in the Record, that constitutes the *nub* of this case. The general rules of law, concerning surcharging Trustees, have long been settled both in America and in England. The question here is how the facts and circumstances shall be analyzed and appraised, in the light of those established legal principles.

This Court has recently recognized the thought above suggested and has held that the problem of determining the liability of a fiduciary in a Bankruptcy Proceeding is not so much a matter of law as it is a question of fact. The case in which this Court so rules, *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80 (1943) is so pertinent and helpful here

that it deserves particular attention. In that case in a Reorganization Proceeding, the S.E.C. had held that certain blocks of preferred stock, which had been acquired at a depreciated price by some of the officers and directors of one of the companies, would not be permitted to participate in full with other preferred stock, because the S.E.C. determined that the directors and officers in question had made use of their "unique advantage" to buy the stock by virtue of being members of one of the Reorganization Committees. In reversing that ruling of the S.E.C. this Court said:

> "We completely agree with the Commission that Officers and Directors who manage holding companies in process of reorganization * * * occupy a position of trust. We reject a lax view of fiduciary obligations and insist upon their scrupulous observance" (Citing cases).

Of course that doctrine about a "lax view of fiduciary obligations" is fully agreed to and accepted in this case by Darrow and his Counsel. But this Court then goes on to point out that the real problem involved (the *nub* of the case as we have said) is the interpretation and application of those principles as applied to the facts and circumstances of the particular case. On that point this Court said:

> "But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?"

In the *Chenery* case the S.E.C. urged that it was "merely applying the broad equitable principles" which it had deduced from the decisions that it urged upon the Court. That is of course exactly what the S.E.C. is attempting to do in the case at bar. This Court brushed aside that

"broad equitable principles" assertion of the S.E.C. when it said:

> "The cases upon which the Commission relies do not establish principles of Law and Equity which in themselves are sufficient to sustain its Order. • • •
>
> "Determination of what is fair and equitable calls for the application of ethical standards to particular sets of facts. But these standards are not static."

The "Stern Rule" of the S.E.C. Rejected.

In concluding its Opinion this Court in the *Chenery* case refused to approve and adopt what it called the "stern rule" urged by the S.E.C. In commenting on the contentions of that Agency in that respect the Court said:

> "It contends that these considerations warrant the stern rule applied in this case since the Commission 'has dealt extensively with corporate reorganizations, both under the Act' ", etc.

That language about the "stern rule" urged by the S.E.C. in the *Chenery* case is very pertinent to the contentions of the S.E.C. and of the Petitioners in the case at bar. We submit that this Court should not go beyond the force and effect of all of the decisions in the past, so far as surcharging Bankruptcy Trustees is concerned, and that it should deny and reject the "stern rule" which the S.E.C. and the Petitioners insist should be applied in surcharging Darrow in this case.

An Outstanding Modern Federal Case.

We come now to a consideration of the modern Federal decisions with respect to surcharging Bankruptcy Trustees. The outstanding case in the Books on this point, we believe, is *In re Marcus*, 67 F. (2d) 1008, where the Court

of Appeals for the 3rd Circuit affirmed the decision of the trial court reported in 2 Fed. Supp. 524, in a summary Opinion. The facts in the *Marcus* case and the actual issues involved are so closely parallel to the *Darrow* case that they deserve close and careful analysis. In that case a Bankruptcy Receiver was operating a chain of grocery stores in the City of Pittsburgh and like Darrow, in the case at bar, the administration of the Trust was complicated and involved on its *business* side. Because of the necessities of the situation the Receiver in the *Marcus* case (without any court authority whatever) proceeded to retain as part-time employees two of the Marcus brothers, whose questionable dealings in the past had brought the stores into bankruptcy. The evidence showed that during the Receivership these two employees secretly stole $31,000 worth of merchandise and $53,000 in cash, while they were helping to operate the business. On that state of facts the Referee in Bankruptcy had surcharged the Receiver for both of those items—a total of $84,000.00. The District Court (Judge Schoonmaker) reversed the decision of the Referee and held that the Receiver could not be surcharged in any respect whatever under the facts and circumstances of the case. In so holding Judge Schoonmaker said (2 Fed. Supp. 524):

> "We take it to be elementary law that a Receiver will not be personally liable for losses sustained in the administration of an estate where he exercises good faith and ordinary care and prudence; *nor will he be held for losses resulting by reason of the negligence of his employees without personal fault on his part in matters necessarily or properly committed to them in the management of the trust property.*
>
> "The Pennsylvania Courts I believe lay down the correct rule, i. e., *that a receiver is liable to surcharge only when guilty of fraud or supine negligence equivalent to fraud.*" (Italics added.)

It is interesting to note that the District Court's language, about "personal fault" and about "supine negligence" comes directly from the Opinion of this Court in the case of *Taylor* v. *Benham*, 5 How. 233 already discussed.

It will be noted that in the *Marcus* case there was a heavy loss to the creditors, and in spite of that fact the Federal Court refused to surcharge the Receiver. In the *Darrow* case, as we have shown, no loss whatever was sustained by the two Bankrupt Estates, but on the contrary very large benefits accrued as a result of the transactions of Darrow with his part-time employees.

Employment of Former Personnel the "Usual Procedure."

In its Opinion in the *Marcus* case the District Court points out in sensible and convincing fashion that it was the traditional practice and "usual procedure" in Bankruptcy Proceedings to employ the experienced personnel of the Bankrupt Estate, where complicated business transactions had to be carried out. In approving that traditional policy and laying down a doctrine that clearly would commend Darrow for his employment of Kulp and Miss Johnson in this case, Judge Schoonmaker said:

> "In this case the counsel for the petitioning creditors * * * advised the Receiver to continue the employment of the Marcus Brothers and other regular employees in carrying on the business. * * * *Such employment of the bankrupts in running a business by a Receiver was the usual and ordinary course of procedure in bankruptcy cases in this District.* * * * (Italics added.)
>
> "The Referee * * * rests his finding of negligence on the part of the Receiver on the charge that the Receiver failed to exercise proper supervision of the operation of the business * * *. After a careful review of the evidence we are not convinced that these charges of neglect have been sustained."

Surcharging a Trustee to be Determined "From the Whole Case."

We conclude our discussion of the *Marcus* case by a short consideration of the point that was obviously the deciding factor in the decision of the District Court, that in justice and equity no surcharge could be made against the Receiver in that case. That deciding factor is the principle that the question of surcharging a Trustee must be determined "from the whole case," as the facts and circumstances are measured and appraised by a Court of Equity. The language of the Court in the *Marcus* case is most pertinent to Darrow's conduct in the case at bar, as shown by the following statement:

> *"From the whole case it appears to us that the Receiver exercised the utmost good faith in the conduct of the trust, and exercised all of the care and prudence in the management thereof, which could properly be expected under the circumstances. We cannot find that there was any lack of proper supervision.* • • • *We therefore conclude that there was no such neglect due to lack of proper supervision which would justify us in charging against the Receiver the total losses due to the thefts of the Marcus group."* (Italics added.)

As already indicated the Court of Appeals for the 3rd Circuit affirmed Judge Schoonmaker (67 Fed. (2) 1008) and said in a brief Opinion:

> "In this bankruptcy case the Referee surcharged the Trustee for alleged negligence in administering the bankrupt's estate. • • •. Judge Schoonmaker reversed the action of the Referee and • • • fully discussed every phase of the case. • • • We find ourselves in accord with his action. • • • We avoid needless restatement of what the Judge has already once said and limit ourselves to affirming the Court's Order."

It should here be stated that this Court denied Certiorari in the *Marcus* case in 291 U. S. 679, thereby refusing to disturb the generous rule with respect to surcharging a Bankruptcy Receiver, which had been applied in that case.

It should further be noted here that the Court of Appeals in its Opinion relied heavily upon the *Marcus* case and adopted the language of that case as the rule of law to be applied so far as surcharging Darrow is concerned.

Further Federal Decisions on the Point.

In Respondent Darrow's Brief before the Court of Appeals certain additional Federal Court decisions were argued at some length. It is obvious that these Federal cases also impressed that Court because they are referred to and quoted from and approved in its Opinion. These cases will be discussed here in summary fashion.

A case that is strongly relied on by the Court of Appeals is *Evans* v. *Williams*, 276 Fed. 650. That also was a Bankruptcy case in which it was insisted that the Trustee should be subjected to a surcharge "for losses incurred in the operation of the business." The matter was referred to a Referee who after an extended Hearing recommended a surcharge against the Trustee for $11,759.51. The District Court affirmed that surcharge but it was reversed by the Court of Appeals which said in its Opinion:

> "The Receiver could not, and of course was not expected to manage a business of this magnitude, without expert assistance. He did employ a competent and experienced man as general manager, and another competent and experienced man as bookkeeper. Had he failed to do this he would have been guilty of gross negligence. While it is suggested that these men purposely falsified the accounts and delivered to him false

> inventories, nevertheless it is not contended that the Receiver had any reason to believe that the inventories and accounts were not correct, * * *"

It will be noted that in the *Evans* case there was an outright loss to the Estate of a substantial amount due to the peculations of the Receiver's employees. As we have shown in our Statement of the Case the contrary is true in the case at bar, since Darrow's use of these employees and their experience in the premises resulted in very large benefits and profits to the creditors of both Federal and National. Yet in spite of the heavy loss to the creditors in the *Evans* case, the Court refused to surcharge the Receiver. In adopting the same rule, that the surcharge must be determined "from the whole case," which was so properly laid down in the *Marcus* case *ante*, the Court said in the *Evans* case:

> "Taking all these facts into consideration, * * * the court has reached the conclusion that his failure (to discover the falsity of the employee's report) was not such negligence as would entitle the creditors to recover from him personally the losses sustained. * * * Therefore the judgment of the district court is reversed."

Another case that should be mentioned here is *In Re Berger Sausage Co.*, 129 F. (2d) 62, decided by the Court of Appeals for the 7th Circuit. In that case it again appeared that "very large losses" had been incurred by the Trustee in the operation of the business as a going concern. It further appeared from the facts that "the Trustee's methods of bookkeeping were not of the best"; that one of his employees "during his employment" had engaged in a side line business, and had "opened up a retail outlet with money borrowed" from the Trustee himself. As the Court of Appeals below pointed out in the case at bar

there was much stronger reason for surcharging the Trustee in the *Sausage Company* case than for surcharging Darrow. Nevertheless the District Court in the *Sausage Company* case refused to surcharge the Trustee and that judgment was affirmed by the Court of Appeals. In so holding the Court used the following language:

> "The general rule is that receivers are not chargeable with losses resulting from their operation of the business, although it is their duty to exercise diligence in selecting competent employees and informing themselves as to the profits and losses from such operation. See Remington on Bankruptcy, 4th Ed., Secs. 446, 2662 and 2965. The degree of diligence exercised, we think, is a matter for the bankruptcy court to determine." (from the facts of each case.)

Another pertinent case urged in Respondent Darrow's Brief in the Court of Appeals and cited by that Court in its Opinion below is *In re Portex Oil Co.*, 43 Fed. Supp. 859. In that case, as in the case at bar, objections were filed to the final account of the Receivers in a Bankruptcy Proceeding. An Application was made to surcharge him for monies lost to the Bankrupt Estate through the conduct of an untrustworthy employee. The matter was referred to a Master who took testimony and finally made a Report recommending that the surcharge be denied. The Master's Report was affirmed by the District Court. The facts in the *Portex Oil* case showed that the Receivers had employed one of the former employees of the Bankrupt. The proof showed that this employee was "guilty of defalcations" to a substantial amount. But in that case the Court found that there was "not one suggestion or scintilla of evidence" tending to involve the Receivers. In denying the claim for a surcharge in the *Portex Oil* case the District Court used language that is clearly pertinent to the case at bar.

"The amounts so abstracted cannot be charged against the Receivers. It has always been recognized as a principle that one serving in a fiduciary capacity *must act in the utmost good faith.* But when he has performed this obligation, he is not liable if he exercises his best judgment. Specifically, a fiduciary is not held liable for defalcations of servants and employees whom he has selected in good faith. This doctrine is applied among others to Receivers. Here the Receivers are absolved from liability." (Italics added.)

We trust that the foregoing summary of the principles of law concerning surcharging Trustees in Bankruptcy which have been announced by the modern Federal Courts will be helpful in the consideration of the present Appeal.

III.

THE SIGNIFICANT ENGLISH CASES, ETC. ON SURCHARGING TRUSTEES.

This Court and the English Cases.

This Court, in the leading case of *Taylor* v. *Benham*, 5 How. 233 (already discussed in this Brief), clearly shows that the Law of England concerning surcharging trustees has been adopted as the general law of this country on the subject. The point about the "common law" of England being the law of this country concerning the liability of trustees is again announced by this Court in the modern case of *Willoughby* v. *Howard*, 302 U. S. 445 (also discussed *ante* in this Brief). The American Text Writers and Encyclopedias constantly cite and quote from the early English cases concerning surcharging trustees. Accordingly, we find the Court of Appeals, in its opinion below, strongly relying on the English authorities and decisions in its

ruling absolving Darrow from a surcharge in the case at bar. It should therefore be pertinent and helpful here to give a short discussion of the leading English cases and authorities on the point.

The Origin of the Doctrine of Surcharge—1682.

This Court, in the leading case of *Taylor* v. *Benham*, cited above, clearly indicates that the law concerning surcharging trustees goes back to the early English cases and cites several of those English cases, including the case of *Palmer* v. *Jones*, 1 Vernon 144, decided by the High Court of Chancery in 1682. On examining that case, it will be found to be a proceeding to surcharge a trustee where he was apparently not as diligent as he might have been in his management of the estate, but where the loss occurred "without his willful default". In refusing to make the surcharge which was asked for, the Lord Chancellor said:

> "Very supine negligence might indeed in some cases charge a trustee with more than he had received * * * but then the proof must be very strong."

Here, then, nearly 300 years ago in England, we find the origin of the principle that a trustee will not be surcharged, where he is without personal fault, unless there is evidence of "supine negligence".

The Leading Case of Ex Parte Belchier.

No appraisal or consideration of the law of surcharging a bankruptcy trustee for the neglect or derelictions of an employee can be adequately made without a study of the early English case of *Ex parte Belchier*, decided by Lord Hardwick in the High Court of Chancery in 1754 (1 Amb.

218; 27 Full English Reprint 144). That case was strongly urged by us in Respondent Darrow's Brief before the Court of Appeals, and the case is cited and relied upon by that Court in its opinion. In that case, the English court had before it the question of the liability of an Assignee in bankruptcy who had employed a broker to sell a substantial quantity of tobacco belonging to the bankrupt estate. The sale was made and the purchase price was paid to the broker, who shortly thereafter died insolvent. It was claimed that the Assignee "ought to bear the loss". It was shown that the broker had received the large sum of 924 pounds but had paid over only 439 pounds. The Assignee, in his account, charged himself only with the actual amount of monies received, the loss being 485 pounds. The trial court held the Assignee liable for the full amount of the money received by his employee, including the amount lost. Lord Hardwick, then Lord Chancellor of England, reversed that holding and said:

> "If Mrs. Parsons (the Assignee) is charged in this case, no man in his senses would act as Assignee in Bankruptcy. This Court has laid down a rule with regard to the transactions of Assignees, and more so of Trustees, so as not to *strike terror into mankind* acting for the benefit of others and not for their own.
> "* * * Where Trustees act by other hands, either from necessity or conformable to the common usage of mankind, they are not answerable for losses." (Italics added.)

"Striking Terror" In Bankruptcy Trustees.

It will be noted that the reason Lord Hardwick gives for not applying a stern and drastic rule of liability, is the unwillingness of courts of equity to "strike terror" into the minds of persons who might act as such trustees. In the present case, it might well be asked what Darrow,

or any other sensible man, would do when asked by a bankruptcy court to become Trustee in Bankruptcy, if he were confronted with the possibility of being surcharged in the heavy sum of more than $43,000.00, for doing exactly what his judgment and conscience told him to do. He wanted to get skilled and experienced assistants in managing the complicated affairs of Federal and National, and the only place he could turn for such skilled assistance was to Kulp and Miss Johnson. Because he exercised his judgment in determining to employ those persons, the SEC and the Petitioners here are asking this Court to assess a heavy penalty against him, where no actual loss whatever has occurred to the estates.

The same idea about the effect of such a stern and drastic doctrine of law on businessmen who might be called upon to act as trustees, is emphasized, as we have seen, in the California case of *Ellig* v. *Naglee*, 9 Cal. 684, already discussed, where Justice Field, later of this Court, concurred in the opinion. The opinion in that California case states that "very supine negligence or wilful default" is necessary to surcharge a trustee, and then says:

> "But to make them liable for mere errors in judgment would tend to discourage good and prudent men from undertaking any trust."

The rule of law which Petitioners, aided by the SEC, seek to have this Court establish would, in the language of Lord Hardwick in the *Belchier* case, "strike terror" in the hearts of trustees in bankruptcy. We submit that this would result in such trustees doing only the minimum they are obliged to do, in the administration of Bankruptcy estates. They would refrain from exerting any unusual effort to benefit such estates for fear of being punished or penalized. Darrow adopted the active policy of doing

everything which in his judgment would benefit the estates he was administering. As a result of such efforts in the acquisition of securities of the subsidiary companies, the bonded indebtedness of the subsidiaries has been substantially reduced, and in addition, the two Trusts, National and Federal, have made large profits. Had the rule now contended for by Petitioners and the SEC been established as the law at the time of his appointment, Darrow would never have dared to take advantage of the opportunity he had through Johnson and Kulp to benefit the Estates.

The Modern English Case of Speight v. Gaunt.

In the modern English case of *Speight* v. *Gaunt*, 9 A. C. 1, the trial court had surcharged a trustee who had employed a stockbroker to invest the funds of the trust, and the broker stole the funds and later went bankrupt. It was proved that the broker's firm had acted for the Testator personally, before his death and before the trust came into being—a fact somewhat similar to the circumstance that Kulp and Miss Johnson, in this case, had acted for the prior trustee Andresen. The Court of Chancery (22 Ch. 2027) reversed that finding of the trial court and held that the trustee could not be surcharged under the circumstances of the case. The House of Lords, in the cited decision, affirmed the Court of Chancery and again absolved the trustee. In so doing, the Lord Chancellor said:

> "In the early case of *Ex parte Belchier* (1 Amb. 218) before Lord Hardwick, it was determined that * * * when according to the usual and regular course of business * * * and without any misconduct or default on the part of the trustee, a loss takes place, through any fraud or neglect of the agents employed, the trustees are not liable to make good such loss. That authority has ever since been followed."

It will be noted that the doctrine goes straight back to Lord Hardwick's language in the *Ex parte Belchier* case. It will also be noted that the language given above from the *Speight* v. *Gaunt* case is quoted in the opinion of the Court of Appeals in this case (R. 686).

In the House of Lords, Lord Fitzgerald laid down the doctrine of law applicable as follows:

> "I accept it as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless he may, in the administration of the trust, avail himself of the agency of third parties such as bankers, brokers or others, if he does so from moral necessity or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated unless some negligence or default of his has led to that result."

Necessity of an Actual "Loss" for a Surcharge.

It will be noted that in the *Belchier* case and the *Speight* v. *Gaunt* case there existed substantial cash losses to the trust estate in question. It is obvious, therefore, that this factor of *loss* is an essential element in any surcharge of a trustee for the acts of his employees.

Parliament Recognizes the Liberal Rule Concerning Surcharging Trustees.

It will be of interest to this Court in the case at bar, we believe, to know that the English Parliament has recognized the liberal rule of not surcharging a Trustee for acts of his employees where the Trustee himself is personally without fault and has acted in "good faith". Here indeed is a weather vane of the modern law which we believe

may be of interest to the Courts of Equity in the United States.

The English "Trustee Act" of 1925 (15 Geo. V, c. 18; Complete Statutes of England, Vol. 20, p. 114) contains the following pertinent provisions with respect to the power of a Trustee to employe agents etc.:

> "Sec. 23. *Power to Employ Agents.* Trustees, or personal representatives, may, instead of acting personally, employ and pay an agent * * * to transact any business or do any act required to be transacted or done in execution of the Trust * * * and shall not be responsible for the default of such agent if employed in good faith."

We have said above that this provision constitutes a recognition by the English Parliament of the modern tendency of the law to treat Trustees with "the utmost consideration" where questions of surcharge are involved.[4] That Section and that language of the English Act of 1925 was construed favorably and liberally toward Trustees in the case of *In re Vickery* [1931] 1 Ch. 572. In that case the Trustee under a will had employed a solicitor to assist him and the solicitor had absconded with a substantial amount of the funds of the Trust, which had come into his hands. There was conflicting evidence in the case as to whether the Trustee had been warned of the bad repute of the solicitor, and had been asked to change solicitors before the actual defalcation occurred. Under the circumstances of the case the Chancery Division refused to hold the Trustee liable for the loss and particularly cited the generous provision of the English Act of 1925 above quoted

[4] In the English case of In re Weal, 42 Ch. D. 674 decided by the English Court of Chancery in 1889, in denying a surcharge which was sought against the Trustee it was said: "Trustees deserve and receive the utmost consideration at the hands of the court * * * and they are entitled to generous treatment."

relieving a Trustee of liability for the default of an employee where the Trustee acted in "good faith". In so doing the English Court said in construing the 1925 Act:

> "It is hardly too much to say that it [Sec. 23] revolutionizes the position of a trustee or an executor so far as regards the employment of agents. * * * No doubt he should use his discretion in selecting an agent, and should employ him only to do acts within the scope of the usual business of the agent; but, as will be seen, a question arises whether even in these respects he is personally liable for loss due to the employment of the agent unless he has been guilty of willful default."

After that discussion about the English Act *per se* the English court takes up the general question of the liability of a Trustee to be surcharged and says:

> "* * * A person is not guilty of willful neglect or default unless he is conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of duty or not. * * * On the whole I have come to the conclusion that the defendant was on any view of the facts guilty only of an error of judgment, and this, in the case of a loss occasioned by the defalcation of a solicitor, does not amount to willful default."

IV.

THERE WAS NO LOSS TO ANY PERSON PROVED BEFORE THE DISTRICT COURT AS A BASIS FOR A SURCHARGE AGAINST DARROW. MOREOVER, THERE ARE NO PRIVATE INTERESTS OR PRIVATE RIGHTS WHATEVER INVOLVED IN THIS APPEAL. THE PROCEEDING IN THIS COURT IS, THEREFORE, A PURELY ABSTRACT AND THEORETICAL CONTROVERSY UPON WHICH THIS COURT SHOULD NOT BE CALLED UPON TO PASS.

The Burden of Establishing a Surcharge by Proof Was Upon the Petitioners.

It has long been the established law in equity that where a surcharge is alleged against a trustee's account, the burden of establishing the basis for such surcharge by adequate proof is upon the parties seeking such surcharge. This well established doctrine has again been recently announced by Judge Learned Hand in *Berner* v. *Equitable Office Building Corp.*, 175 Fed. 2d 218 (C. A. 2, 1949) where that jurist said in a case cited by Petitioners in their Brief (p. 22):

> "It was the rule in equity, when an agent or fiduciary filed his accounts, and the principal or beneficiary had either 'falsified' the credits, or 'surcharged' the receipts, that the agent or fiduciary had the burden of establishing the credits, *and the principal or beneficiary the burden of establishing the surcharges.*" (Italics added.)

The Court will note that the Petitioners in their Brief (pp. 22 and 23) cite this decision of Judge Hand for the following proposition of law which they insert in their Brief:

"A trustee is always held to the highest standard of fidelity and the burden should rest upon him to establish clearly that he has done so."

We call this Court's attention to the patent fact that the above quotation in Petitioner's Brief is the exact opposite of the doctrine concerning the *burden in surcharge matters* which is laid down by Judge Hand in that very case.

Many other cases in the books could be given to support the rule with respect to the burden of proof in establishing a surcharge against trustees, as laid down by Judge Hand, but we think it is unnecessary for us to cite any further cases on that point.

An Abstract and Moot Case Here.

The Record in this case, we submit, clearly establishes the fact that there are no private interests or private rights whatever involved in this proceeding. We have discussed this point at some length in our Statement of the Case in this Brief, and we further urged the point in the two Briefs filed on behalf of Respondent Darrow, before Certiorari was allowed. It is, therefore, apparent that nothing is involved here but an abstract and moot question of law. No loss to any of the creditors of either of these Trusts is charged in the Petition for Certiorari in this case. Nor is this point argued in any of the Briefs which have been filed by the opposition.[5]

The Master, in his report, suggests a loss *arguendo* (R. 554) in criticizing Darrow for his relations with these part-

[5] It is true that in the Petitioner's Brief (p. 9) one of the "errors" charged against the Court of Appeals is:

"9. In failing to find that the Trust Estates suffered losses."

The Petitioners do not argue that there were any losses. On the contrary they tacitly admit (Br. 25) these Estates "suffered no loss in the transactions involved."

time employees. The Master says that Darrow's employment of them "allowed their infidelity to inflict direct financial loss upon the Trusts in many instances." This statement of the Master, however, is entirely unsupported by any evidence whatever in the Record. There was, we repeat, no *loss* suffered by anybody because of the services of these two part-time employees.

It is a rule firmly established in the law that courts will not pass upon moot or abstract controversies. This Court in *Mills* v. *Green*, 159 U. S. 651, said:

> "The duty of this Court as of every other judicial tribunal, is to decide actual controversies * * * and not give opinions on moot questions or abstract propositions."

It is, we believe, unnecessary to cite other cases or authorities on that point.

We therefore urge that the Appeal be dismissed on that ground alone.

V.

THE INTERESTS OF PUBLIC POLICY ARE AGAINST THE STERN DOCTRINE OF SURCHARGING DARROW AS A BANKRUPTCY TRUSTEE AS DEMANDED IN THIS PROCEEDING. UNDER EVERY SOUND ASPECT OF PUBLIC POLICY, BANKRUPTCY TRUSTEES ARE TO BE TREATED JUSTLY AND LIBERALLY BY THE COURTS, EVEN FOR ALLEGED WRONGS AND DEFALCATIONS ETC. OF THEIR EMPLOYEES, UNLESS THE TRUSTEE HIMSELF HAS NOT ACTED IN "GOOD FAITH."

The Stern and Procrustean Doctrine Here Demanded.

In Greek mythology there was a celebrated highwayman of Attica named Procrustes who tied his victims upon an

iron bed of fixed length, and either cut off their legs or stretched them, as the case might be, to fit the length of the bed. It is from that legend we get the well-known metaphorical phrase of "Procrustean doctrine." That allegory, we say, applies exactly to the present proceeding, since it is a most unjust and indeed a stern and Procrustean doctrine which both the Petitioners and the SEC are asking this Court to impose upon Darrow.

During his eight years of Trusteeship Darrow successfully brought these two large Bankrupt Estates from a condition of utter insolvency to a situation where we say without fear of contradiction they can be discharged from bankruptcy with all debts paid. In addition the Record shows that the 27 subsidiary corporations of these two Trusts have all been successfully reorganized and put on their feet by Darrow's management during that period. All this was accomplished with the valuable assistance of the competent and skilled services of Miss Johnson and Kulp. Darrow testified that he could not have achieved that result without them, and the Master finds that "Darrow was correct in his estimation of [their] competence" (R. 552).

And yet because Darrow's fiduciary relationship with his part-time employees does not measure up to what the SEC believes should be the hard and stern measure of a Trustee's obligations in the premises they ask this Court to penalize Darrow in a sum that for him will probably cause his bankruptcy in turn. No cases whatever, as we have seen, are cited for that stern doctrine by the SEC or by the Petitioners but it is claimed merely that a Court of Equity can apply that Procrustean doctrine if it sees fit so to do, even without precedent. This Record shows (p. 350) that Darrow first learned there was any complaint about his administration of these Estates when the Regional

Director of the SEC in Chicago "called me [to his office] to insist upon my resignation."

The Regional Director's own version of that conference (in May or June 1943) is as follows:

> "I believe Darrow came to my office at my request. I asked him to call at my office because in a matter of this kind, where we are going to file a Petition for removal, we felt we should advise him before we actually proceeded. At my conference with Mr. Darrow we discussed our proposed Petitions for his removal. He was in the office only a few minutes. He said he was sorry we were taking this position and he wanted to confer with his Counsel. That was the substance of the conversation." (R. 353.)

Here we find the inception of the war against Darrow which has been carried on by the SEC during all of the eight intervening years.

The Master's Report Finds Darrow Not "Derelict" In His Employment of Johnson and Kulp.

We believe this Court will be interested in some of the findings of the Master in his Report in this case which have been carefully omitted and ignored by both the Petitioners and the SEC. In his conclusions of Law (R. 552-3) the Master discusses the subject of "trading in underlying securities by employees of Trustee." The Master there says, among other things:

> "Hindsight reveals that although Mr. Darrow was correct in his estimation of the competence of Miss Johnson and Kulp he erred seriously in his appraisal of their trustworthiness. However, in view of the information available to him at the time of the original hiring it cannot be said that he was derelict in this respect."

The Master in his Report at the same place discusses the duty of a Bankruptcy Trustee to "exercise proper and ade-

quate supervision" over his employees and he finds on this point: "Admittedly Mr. Darrow's conduct in this respect was satisfactory."

It is true that the Master's Report also contains certain disparaging statements about the Respondent with respect to the operations of his employees in the business of buying and selling "the underlying securities for profit." But that was one of the conditions which the employees had made as a part of their employment by the prior Trustee, Andresen and they had made that a condition also of their employment by Darrow as Trustee. The very large and substantial benefits which have accrued to these Estates could not have been achieved, as we have seen, without the able and competent services (as the Master finds) of these part-time employees. And they would never have consented to assisting Darrow in these matters unless he had permitted them to carry on their private securities business, including dealing in the underlying securities of the two Trusts.

We leave this question of Public Policy and the Draconian doctrine of the law of surcharging trustees demanded by the Petitioners and the SEC without further comment. We merely refer to the discussion about "striking terror" in the minds of Bankruptcy Trustees, found at pages 31 and 32 of this Brief.

VI.

THE CASES AND AUTHORITIES CITED BY PETITIONERS AND THEIR ARGUMENT BASED THEREON ARE NOT SENSIBLY APPLICABLE IN THE CASE AT BAR.

Petitioners' Point I.

Petitioners' Point I erroneously attempts to establish that the Court of Appeals committed reversible error on the

broad ground that it set aside the judgment of surcharge entered by the District Judge. The contention is made *arguendo* that there were "concurrent findings of fact of the Special Master and the District Judge." The Record in this case clearly disputes that contention because the District Judge made no "findings" whatever. He merely entered an extended Opinion of mixed fact and law entitled "Memorandum and Order" (R. 577 to 585).

Accordingly, we say that the whole basis of Petitioners' Arugment that there were "concurrent findings of fact of the Special Master and the District Judge" is completely fallacious.

The Court of Appeals in reversing the District Court's judgment of surcharge specifically restricted its Opinion and ruling to a limited portion of the District Judge's order and "Memorandum" below. It is obvious from a reading of the Opinion of the Court of Appeals that it did not deal with any "findings" of the District Judge. And since the District Judge made no findings, the Court of Appeals was not concerned with the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure—as the Petitioners contend in their Brief (p. 12).

The decision of this Court in the case of *National Labor Relations Board* v. *Pittsburgh Steamship Company*, ... U. S. ...., 71 S. Ct. 453, 95 L. Ed. 318, decided on February 26, 1951 seems to us to be decisive of the entire question presented under this point of Petitioners' Brief. In that case this Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consid-

> eration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.'"

We say, that there is no merit whatever in the proposition of law found under Point I of Petitioners' Argument (Br. p. 11).

Disregarding the question of the entire lack of merits of the Petitioners' proposition, set out under its Point I, we have read and analyzed the four cases cited by them in support of that proposition (Br. p. 12). Incidentally, we feel that it is not proper for counsel merely to cite what they assert are leading cases and then leave the analysis of those cases to opposing counsel. Nevertheless, we have gone into each of those cases and we find none of them to be applicable or helpful in any way.

Petitioners' Point II.

The remainder of Petitioners' Argument (Br. pp. 11 to 28) is devoted to a proposition set out in general terms at the top of page 13 of that Brief as follows:

> *"A TRUSTEE WHO PERMITS HIS CONFIDENTIAL EMPLOYEES TO TRADE IN THE SECURITIES OF HIS TRUST VIOLATES HIS FIDUCIARY DUTY AND SHOULD BE SURCHARGED FOR THE PROFITS REALIZED BY SUCH EMPLOYEES."*

The first and complete answer to be made to that purported statement of the law concerning surcharging Trustees is that it utterly omits any suggestion of the doctrine of loss before a surcharge can be made. In the earlier

portions of this Brief we have, we believe, shown that there can never be a surcharge made against a Trustee unless a financial loss is charged and proved against the Trustee.

Cases Merely Cited and Not Discussed.

Here again we say Petitioners' Brief violates the rule of Advocacy to which we have already averted, in that they merely cite a large number of cases and leave the burden of analyzing those cases to the Court and opposing counsel. In that fashion Petitioners' Brief cites:

Magruder v. *Drury*, 235 U. S. 106 (1914).
Michaud v. *Girod*, 45 U. S. 503 (1846).
Jackson v. *Smith*, 254 U. S. 586 (1921).
In re The Van Sweringen Company, 119 F. (2) 231 (C.C.A. 6, 1941).
Irving Trust Co. v. *Deutsch*, 73 F. (2) 121 (C.C.A. 2, 1934).
Wooten v. *Wooten*, 151 F. (2) 147 (C.C.A. 10, 1945).
Fleishhacker v. *Blum*, 109 F. (2) 543 (C.C.A. 9, 1940).
Trice v. *Comstock*, 121 F. 620 (C.C.A. 8, 1903).
Governor Clinton Co., Inv. v. *Knott*, 120 F. (2) 149 (C.C.A. 2, 1941).
In re Frazin & Oppenheim, 181 Fed. 307 (C.C.A. 2, 1910).
Ex Parte Belchier, 1 Amb. 217; 27 Eng. Reprint 144.
Speight v. *Gaunt* (1883), 22 Ch. 727.
Evans v. *Williams*, 276 F. 650.
In re Marcus, 2 F. Supp. 524.
In re Portex Oil Co., 43 F Supp. 859, D. C., D. Ore. 1942.

In re Breger Kosher Sausage Co., 129 F. (2) 62.
Taylor v. *Standard Gass & Electric Co.*, 306 U. S. 307.
Pepper v. *Litton*, 308 U. S. 295.
Woods v. *City National Bank*, 312 U. S. 262.

We will here dispose of these cases by saying that we have examined each one of them and found them entirely inapplicable to the case at Bar. Further than this, we do not feel called upon to discuss these cases in view of the peremptory manner in which they have been cited in Petitioners' Brief.

Petitioners' Inapplicable Cases.

Petitioners in their Brief (pp. 20-21) rely principally upon the case of *Carson, Pirie, Scott & Co.* v. *Turner*, 61 F. (2) 693 (C.C.A. 6, 1932). That case was cited and argued by the Petitioners in the Argument attached to their petition for Certiorari in this case and the same extended quotation there given (Petition for Certiorari pp. 13-14) is again repeated in Petitioners' Brief (p. 21). In our Brief for Respondent (pp. 15-16) in opposition to Petition for Certiorari, we point out effectively, as we believe, that the *Carson, Pirie, Scott* case is quite inapplicable to the facts here before the Court. In that case, as we have already pointed out, a Trustee in Bankruptcy had employed an auctioneer to sell the merchandise of a department store in Michigan and had paid him $2,013.00 for that service. The creditors objected to the allowance of that sum to the auctioneer because it was shown that the auctioneer had stolen a large quantity of goods from the store while he was acting as the employee of the Trustee. The sordid and criminal acts of the auctioneer in that case and

the heavy loss suffered by the creditors in that case thoroughly justified the Court in charging the Trustee for the loss caused by his fraudulent and criminal employee.

Petitioners (Br. p. 22) next quote from the Opinion of Judge Learned Hand in *Berner* v. *Equitable Office Bldg. Corporation,* 175 F. (2) 218, 221 (C. A. 2, 1949). That case involved the question of the sale of assets of a bankrupt estate and the question was whether the sale had been so conducted as to get the best price for the property. It was because the Court held the Trustee had not carried out that duty that the Judge in that case used the language quoted in Petitioners' Brief. We have already called attention in Part IV of this Brief (p. 38 ante) to the unfairness of Petitioners' discussion in their Brief of the holding of Judge Hand in that case. Petitioners attempt (Br. p. 22) to tell this Court that "the burden should rest upon him" (the Trustee) in a proceeding to surcharge a Trustee. As we have pointed out in the part of our Brief to which we have just referred, Judge Hand holds the exact contrary to be true and that it is the "burden" of those seeking to surcharge the Trustee to make good their case against him.

Petitioners' Brief (p. 23) cites and quotes at length from the case of *American United Mutual Life Insurance Company* v. *Avon Park,* 311 U. S. 138, 146. That case also was cited by Petitioners in their Petition for Certiorari in this case.

The *Avon Park* case involved the composition under the Bankruptcy Act of the debts of a municipality in Florida. In that case it appeared that the "Fiscal Agent" of the City of Avon Park had made a private arrangement under which it stood to make a substantial profit out of the interest coupons which might come into its hands for interest

on bonds held by the bondholders. It was in connection with that obviously fraudulent and illegal "profit" that this Court used the language quoted in Petitioners' Brief (pp. 23-24). In view of the totally different facts involved and the gross impropriety disclosed in the *Avon Park* case on the part of the "Fiscal Agent" of the city, we say the rules of law announced in that case have no application whatever to the *Darrow* case.

The Petitioners' Brief (pp. 26 to 28) cites and discusses in a rather summary fashion three Illinois cases, namely: *Winger* v. *Chicago City Bank & Trust Co.*, 394 Ill. 94 (1946); *Pelcak* v. *Bartos*, 328 Ill. App. 435; *White* v. *Sherman*, 168 Ill. 589 (1897).

These cases again are all based on facts that are totally different from the facts in the *Darrow* case now before this Court, and are to be clearly distinguished from the case at Bar for that reason. We have read and examined these cases and we believe the Court will agree that they are not helpful or applicable upon the present Argument.

In its Conclusion the Petitioners' Brief again comes back to the case of *Meinhard* v. *Salmon*, 249 N. Y. 458—a case which has been cited in every Brief filed by the opposition, both in the Court of Appeals and in this Court. We have already pointed out that the *Meinhard* v. *Salmon* case had to do with a Bill in Equity where one of two real estate speculators in New York City attempted to charge his partner with fraudulent dealings by which the partner had made a substantial profit. It was in holding the partner a constructive Trustee that the New York Court of Equity laid down the doctrine from which the Petitioners make the garbled quotation which appears in their "Conclusion" (Br. p. 29). We think nothing more need be said to show the total lack of application of the *Meinhard* v. *Salmon* case to this *Darrow* case.

VII.

THE SEC ARGUMENT IN SUPPORT OF THE MOTION TO SUBSTITUTE

The Argument in the SEC Brief[6] (pp. 12 to 39) is divided into two points. Point I reads:

> *"THE SUBSTITUTION OF THE PRESENT TRUSTEES OF THE DEBTORS AS PETITIONERS IS PROPER."*

We respectfully submit that the SEC, as Amicus Curiae, has little if any lawful authority to support in this Court the Motion of Whitson and Schwartz to be substituted for Mosser as Petitioner in this case. Nevertheless, the SEC exerts great effort, and devotes thirteen pages of its Argument in support of that Motion. For the reasons suggested in Point VIII of Respondent's Brief and discussed hereafter, we do not propose to argue with the SEC over their

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THE S.E.C. AS AMICUS CURIAE

[6] The S.E.C. is here solely as Amicus Curiae. The S.E.C. was not made a Party to the Petition for Certiorari in any way, and was not even mentioned in it as an interested Party, or otherwise. The records of the Clerk of this Court will further show that no "notice of the Filing of the Petition" (in accordance with Rule 38 of this Court concerning Review on Certiorari) was ever served on the S.E.C., and that the only Party here other than the Petitioners was and is the Respondent Darrow. The S.E.C. as a Government Agency first appeared in this case by filing its so-called "Memorandum—In Support of Petition," in January, 1951. That Memorandum made no claim whatever that the Agency was a Party, but was apparently filed under the former version of the Amicus Curiae Rule of this Court (Rule 27), which previously permitted any "Agency" of the United States to present an Amicus Curiae Brief, when "sponsored by the Solicitor General." But that Rule was stringently revised by this Court in 1949, and no longer gives that Amicus Curiae privilege to a statutory Governmental "Agency" (as distinguished from the Government itself), merely because its Brief is signed by the "Solicitor General."

It is, of course, entirely for this Court to grant or deny the S.E.C. the privilege of filing a Brief as Amicus Curiae in this Bankruptcy Appeal; although the statute (11 U.S.C. 608) forbids the S.E.C. to "appeal or file any petition for appeal" in this proceeding. But on that point we respectfully suggest that the intervention of the S.E.C. in this case has greatly burdened the Respondent Darrow in this litigation and has very substantially added to his attorneys' fees and printing costs.

right to support that Motion. We are content to leave that to this Court without further discussion.

VIII.

REPLY TO THE SEC ARGUMENT ON THE MERITS.

In its Argument on the merits (Br. pp. 25 to 39) the SEC contents itself by laying down one blunt statement of the law as the SEC would like to have it in the following words:

> *"IT WAS PROPER TO SURCHARGE THE BANKRUPTCY TRUSTEE FOR PROFITS REALIZED, WITH HIS KNOWLEDGE AND ASSISTANCE, BY HIS SUBORDINATES FROM TRADING IN SECURITIES OF THE DEBTORS' SUBSIDIARIES."*

The first point that we make with respect to that purported proposition of law is one we have already made in discussing the major contention of the Petitioners in this case, namely: That the rule of law above contended for entirely omits the essential factor of loss before a surcharge can be made against a Trustee.

Cases Cited But Not Discussed.

The SEC Brief (pp. 26 to 38) cites the following cases without any discussion whatever:

United States ex rel. Willoughby v. *Howard*, 302 U. S. 445, 452.

Meinhard v. *Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928).

Taylor v. *Standard Gas & Electric Co.*, 306 U. S. 307.

Woods v. *City National Bank and Trust Co.*, 312 U. S. 262.

Young v. *Higbee Co.*, 324 U. S. 204.

In re Norcor Mfg. Co., 109 F. 2d 407 (C. A. 7).

In re Realty Associates Securities Corp., 56 F. Supp. 1008 (E. D. N. Y.).
In re Schroeder Hotel Co., 86 F. 2d 491 (C. A. 7).
Bigelow v. *RKO Pictures, Inc.*, 327 U. S. 251, 265.
Story Parchment Co. v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 563.
Carson, Pirie, Scott & Co. v. *Turner*, 61 F. 2d 693 (C. A. 6).
In re Curtis, 76 F. 2d 751 (C. A. 2).
Young v. *Potts*, 161 F. 2d 597, 600 (C. A. 6).
Magruder v. *Drury*, 235 U. S. 106, 118-120.
In re Waern Building Corp., 145 F. 2d 584, 586 (C. A. 7) certiorari denied, 324 U. S. 871.
In re Grosse, 24 F. 2d 305, 306 (C. A. 7).

We have already called attention in our comment on the Petitioners' Brief to what we consider to be a violation of the rules of Advocacy which imposes the burden upon opposing counsel of reading and analyzing a number of cases cited in a Brief but not discussed therein. We have read and analyzed all of the cases cited by the SEC and listed above but, in view of the summary manner in which they are cited we feel we are not called upon to give them any particular attention. We will merely tell this Court that, in our considered opinion, not a single one of the cases so cited is of any help or value in determining the issue in the case at Bar, and that each one of those cases, upon analysis of its facts, will be found to be inapplicable to the facts in the Darrow case.

A Single Case Discussed in the SEC Brief

Only one case is considered and discussed throughout the entire Argument of the SEC Brief on the merits. This is the case of *Bigelow* v. *RKO Pictures, Inc.*, 327

U. S. 251, decided by this Court in 1945. After *lifting* a part of a sentence from the opinion in that case, to the effect "that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created", the SEC Brief then quotes the following statement from the opinion as being applicable to the case at bar:

> "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of recovery."

This Court will remember the *Bigelow* case and the opinion of the Court by the late Chief Justice Stone. It is with some reluctance that we point out what we consider the misinterpretation of this Court's language in that case. The quotation given in the SEC Brief is a part of a paragraph from Chief Justice Stone's opinion dealing with the measure of damages before a jury. The quotation which is given in the SEC Brief is preceded in the opinion by the following language:

> "But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential, as well as upon direct and positive proof'." (Citing several cases.)

It is upon that basis and upon that limited reference to the things which a jury may consider that Chief Justice Stone lays down the doctrine quoted in the SEC Brief as above indicated.

We leave without further comment the question whether that quotation so heavily relied upon by the SEC Brief has any application whatever to this Darrow Case where the

matter is in equity and not before a jury, and where the issue is the justice of surcharging a trustee and not of proving damages before a jury.

We conclude our discussion of the SEC Brief on the merits, by repeating again our assertion that none of the cases or authorities cited in it have any application to the case at bar.

IX.

MOTION OF WHISTON AND SCHWARTZ TO BE SUBSTITUTED AS PETITIONERS.

This Court in granting the Petition for Certiorari reserved its decision on the motion of Whiston and Schwartz, Successor Trustees, to be substituted for Mosser as the Petitioner herein. Respondent Darrow has already discussed this question fully in his ANSWER TO THE MOTION AND BRIEF in support thereof at Pages 2-13 inclusive. That discussion, we submit, establishes the proposition that this Court should not grant the motion on jurisdictional grounds and that it should not permit such substitution. The main points we there stress are:

1. There was a lack of diligence of the Movants in the premises.

2. The Bankruptcy statute on death or removal of a Trustee does not apply to that Motion.

3. The Rule of this Court (Rule 19 (4)) concerning substitution of parties is inapplicable.

4. The cases and decisions of this Court are squarely against that Motion.

We feel we should not burden the Court with a further discussion and argument on this point.

CONCLUSION.

We respectfully submit that under all the facts and circumstances in this case as shown by the Record and under the law applicable thereto as discussed above, the Petition for Certiorari should be dismissed or the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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